Supreme Court, U.S.
FILED
FEB 2 2001
OFFICE OF THE CLERK

(3)

No. 00-984

IN THE

Supreme Court of the United States

MOTEL 6 OPERATING L.P. and
ACCOR ECONOMY LODGING, INC.,

Petitioners,

v.

ART HUTTINGER and DONNA HUTTINGER,

Respondents.

MOTEL 6 OPERATING L.P. and
ACCOR ECONOMY LODGING, INC.,

Petitioners,

v.

JAMES FENNERN and DELORES FENNERN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

MICHAEL F. MARINO
Counsel of Record
FREDERIC FREILICHER
HUNTON & WILLIAMS
Attorneys for Petitioners
Suite 1700
1751 Pinnacle Drive
McLean, Virginia 22102
(703) 714-7400

165070

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

7pp

The principal question in this case raises a significant legal – not factual - issue left open in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097 (2000). That issue concerns the quantum of evidence necessary to avoid JAML When this Court vacated and remanded this case for further consideration in light of *Reeves*, we anticipated that the Ninth Circuit would make the careful analysis of the evidence required by *Reeves*. Respondents have not been able to demonstrate that the court of appeals made the *Reeves* analysis of the strength of the plaintiff's *prima facie* case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case. Neither have Respondents been able to show how the court of appeals had jurisdiction to decide the interlocutory appeal in the *Fennern* case in the face of the district court's refusal to find that any issue in the case involved a controlling question of law as to which there is substantial ground for difference of opinion. If anything, Respondents' argument suggest the importance of this Court's clarifying the jurisdictional standard for interlocutory appeals. The Respondents' argument that the court of appeals correctly reversed the district court on the consolidation issue ignores that the court of appeals' principal basis for that reversal – the similarity of the reasons for the discharges in both cases – is not supported at all in the record, as Respondents tacitly admit.

1. Respondents contend that Motel 6 is asking this Court to review purely factual issues. (Resp. Br. 18-19) The salient facts are not in dispute, however. The issue before the Court is a legal one – whether Respondents' pretext evidence was sufficient to avoid judgment as a matter of law (JAML) or, alternatively, a new trial, where Respondents had no direct probative evidence that Motel 6 was motivated to discriminate against Respondents on the basis of age and their pretext evidence was weak.

The undisputed facts in these cases are, if anything, less complex than those in *Reeves*. Respondents, Motel 6, and the court of appeals do not disagree, for example, that the Huttingers were discharged in part for discrimination against Native Americans and that there was no direct evidence of Motel 6's intent to discriminate against the Huttingers on the basis of age.[1] There is also no dispute that Motel 6 introduced documentary evidence, heavily relied upon by the district court, that the Huttingers were discriminating against Native Americans up until the time they left for vacation in 1993. (See Pet. 6-7) It is also undisputed that the Huttingers generally denied discriminating against Native Americans after 1990 but, like Respondents in their Opposition, offered no explanation why a memorandum discriminating against Native Americans bearing desk clerk Jenson's handwritten name, which Donna Huttinger admitted was in Huttinger's handwriting, was found in the Huttingers' motel file. Jensen was not hired until 1993. Even without desk clerk Jensen's and Relief Manager Malone's corroborating testimony, this document stands as an unrebutted example of the Huttingers' blatant discriminatory policy against Native Americans. The "factual issues" in this case are not "issues" at all. There is no dispute about the essential facts, only about their legal significance.

Respondents contend that Malone was not a disinterested witness because she wanted to relocate to Idaho and to take

1. Respondents suggest that in the *Fennern* case there was direct evidence of Motel 6's discriminatory intent. (Resp. Brief. "Questions Presented" No. 1 and p. 24 n.4) That evidence consisted of Massman's two passing remarks, made months before their discharge, that he could replace the Fennerns with "college students." The district court concluded that these ambiguous statements were insufficient direct evidence of Motel 6's intent to discriminate. (App., *infra*, 41a) That conclusion is uniformly supported in the case law. *See, e.g., Nesbitt v. Pepsico, Inc.*, 994 F.2d 703, 705 (9th Cir. 1993); *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 918 (9th Cir. 1997)

over management of the Huttingers' motel. (Resp. Br. 22) Malone was interested in relocating to Idaho at the time of the Huttingers' discharge, however, *not* at the time of trial, which took place much later. (Tr. 1417-18) It is not disputed that at the time of trial, Malone was employed as a school bus driver and thus had no apparent bias in favor of Motel 6 based on her employment. (Tr. 1354-55) Respondents' contention (Resp. Br. 22) that because Malone once benefited from her Motel 6 employment she was "locked in" to a pro-Motel 6 story, if carried to its logical extreme, would mean that a former *employee* could never give credible testimony on JAML. That simply makes no sense.

2. Respondents state that Motel 6 "failed to raise . . . [the] jurisdictional issue before the Ninth Circuit panel." (Resp. Br. 28) In fact, on June 5, 1998, prior to the time the Fennerns' 28 U.S.C. 1292(b) petition was heard by the Ninth Circuit's motions panel, Motel 6 timely filed an 18-page brief in opposition, raising the same jurisdictional issues presented to this Court.[2]

Respondents contend that, even though the district court specifically found that an interlocutory appeal of any individual question of law was "unwarranted" (Pet. App. 30a), the district court really found that the "pretext plus" issue presented a controlling question because it certified the case on the basis that review now could shorten the time, effort, and expense of litigating the case. (Resp. Br. 24-25)

For three reasons, Respondents are wrong. First, the district court's certification had nothing to do with the "pretext plus" issue. It was concerned that the question whether Motel 6 had acted willfully would not be submitted to the jury at a second trial, but that the court of appeals might 'ater reverse the district court on that issue, requiring

---

2. Judge Reinhardt sat on both the motions panel and the merits panel. (Pet. App. 15a, 2a).

a third trial. (Pet. App. 29a-30a) Second, the statute speaks in the disjunctive. It requires the district court to find that there is a controlling question of law as to which there is substantial ground for difference of opinion *and* separately to find that an immediate appeal may "materially advance the ultimate termination of the litigation." (28 U.S.C. § 1292(b)) To import satisfaction of the "materially advance" requirement into the "controlling question" requirement would make the controlling question requirement superfluous in those cases where the "materially advance" requirement was satisfied. Congress indicated no such disposition to do so.

Third, Respondents' cases are of no help in this new trial case. In *Kay v. Kuehner*, 84 F.3d 316, 319 (9th Cir. 1996) the district court had specifically found that the case involved a controlling question of law and the court of appeals agreed that where the issue is whether the district court has power to decide the case that is a controlling question. Plainly that is not our case. In *Gallimore v. Missouri Pacific Railroad Co.*, 635 F.2d 1165, 1168-69 n.4 (5th Cir. 1981), the court of appeals assumed jurisdiction was proper; there was no dispute concerning what was a controlling question of law. The same is true of *In re Convertible Rowing Exerciser Patent Litigation*, 903 F.2d 822 (Fed. Cir. 1990) and of *Hadjipateras v. Pacifica S.A.*, 290 F.2d 697 (5th Cir. 1961). If, in fact, Respondents are right that some courts are using a favorable finding on the "materially advance" requirement to satisfy the "controlling question" requirement, that simply serves to demonstrate that there is a split in the circuits which this Court should resolve. (See Pet. 24, citing cases from the Seventh and Eighth Circuits.)

Finally, Respondents' "water over the dam" argument that the Ninth Circuit has already heard the cases (Resp. Br. 27) misses the critical jurisdictional point: If the Ninth Circuit never had jurisdiction to hear the case in the first place, the fact that it decided the case is irrelevant.

3. Respondents allege that Motel 6 decided not to move for separate trials when Plaintiffs announced that they would not attempt to show a pattern of age discrimination through statistical evidence because Motel 6 made a tactical decision to try the cases together. (Resp. Br. p. 29 n.5) Motel 6 did not at any time choose to try the cases together. In fact, Motel 6 opposed consolidation of the cases at the time Respondents moved for consolidation. (C.R. 55) It did not move for separate trials again just prior to trial simply because it could not have foreseen that Respondents' withdrawal of their statistical evidence case just before the trial started would still allow Respondents to mislead the jury by arguing a pattern of age discrimination based just on the two cases, without Motel 6's having the opportunity for rebuttal grounded on its statistical evidence.

Respondents acknowledge but attempt to downplay the lack of similarity of the reasons given for the discharges of the Huttingers and Fennerns – the "district court mistakenly fixed upon this distinction. . . ." (Resp. Br. 28) The problem with Respondents' analysis is that court of appeals also "fixed" on the reasons for the discharge, mistakenly finding that they were "similar." (Pet. App. 16a) That erroneous finding was critical to the court of appeals' reversal of the district court. *Id.*

CONCLUSION

For the foregoing reasons, and those presented in the Petition, the Court should grant Motel 6's petition for certiorari in these cases and reverse the court of appeals rulings on the issues presented here.

Respectfully submitted,

MICHAEL F. MARINO
Counsel of Record
FREDERIC FREILICHER
HUNTON & WILLIAMS
Attorneys for Petitioners
Suite 1700
1751 Pinnacle Drive
McLean, Virginia 22102
(703) 714-7400